No. 14-915

In the

Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Twice in the past three years this Court has recognized that agency-shop provisions—which compel public employees to financially subsidize public sector unions' efforts to extract union-preferred policies from local officials—impose a "significant impingement" on employees' First Amendment rights. *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012); *see also Harris v. Quinn*, 134 S. Ct. 2618 (2014). California law requires every teacher working in most of its public schools to financially contribute to the local teachers' union and that union's state and national affiliates in order to subsidize expenses the union claims are germane to collective bargaining. California law also requires public school teachers to subsidize expenditures unrelated to collective bargaining unless a teacher affirmatively objects and then renews his or her opposition in writing every year. The questions presented are therefore:

1. Whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Employment Relations Bd.*, 49 Cal. 3d 575 (1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION FOR WRIT OF CERTIORARI

California law forces all public school teachers to pay chargeable dues to the labor union that represents them, regardless of whether they are union members. Cal. Gov't Code § 3546(a). California law also forces all public school teachers to pay nonchargeable union dues unless they expressly opt-out of those payments. *Cumero*, 49 Cal. 3d at 589-90 (nonchargeable expenditures "may also be financed out of service fees paid by nonmembers who are sufficiently informed of the proposed expenditure and are given an opportunity to object, yet fail to do so."). A group of teachers, plaintiffs in this case, challenged both of these laws as unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution. Because the teachers understood their claims are currently foreclosed by *Abood v. Detroit Board of Education* and Ninth Circuit decisions following *Abood*, they conceded the points under existing law, and moved the case through the lower courts as quickly as possible.

As this Court acknowledged in *Knox* and *Harris*, the decision in *Abood* was based on faulty premises and an unrealistic view of public-employee unionism, with the resulting infringement on individual rights. The decision in *Harris* essentially invited the case now before the Court, and the *Friedrichs* plaintiffs made every effort to accept that invitation promptly, with a case cleanly presenting the very issues this Court forecast it would be willing to consider.

This is an ideal time to review the public employee unions' ability to garnish workers' paychecks for the inherently political act of collective bargaining

for taxpayer-funded wages and benefits. *Knox*, 132 S. Ct. at 2289 (a union inevitably "takes many positions during collective bargaining that have powerful political and civic consequences."). California's public teacher unions have spent tens of millions of dollars on controversial political causes such as same-sex marriage, gun control, and the Patient Protection and Affordable Care Act, and can be expected to do so in the future. *See e.g.*, Michael J. Mishak, *California Teachers Assn.: A powerful force in Sacramento*, Los Angeles Times (Aug. 18, 2012) (describing CTA's clout wielding a "war chest as sizable as those of the major political parties").[2] A nonunion public school teacher has only six weeks to object to paying for these nonchargeable expenses after receiving notice of the union's breakdown of chargeable and nonchargeable dues. Absent a timely objection, the teacher must pay the entire amount. Pet. at 5, citing Regs. of Cal. Pub. Emp't Relations Bd. § 32993(b).

Abood has stood as a blot on individual rights for almost 40 years. This case clearly puts before the Court the question of whether it is time to rid our constitutional jurisprudence of this aberration, that permits states to violate individuals' First Amendment rights for the benefit of public employee unions' collective politicking. Moreover, whether or not this Court overrules *Abood*, dissenting workers' rights can only be protected by an opt-in system that requires the unions to obtain affirmative consent from workers before docking their paychecks to support union activities. This Court's decisions in *Knox* and *Harris* so thoroughly undercut the foundations of *Abood* that the

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[2] Available at http://articles.latimes.com/print/2012/aug/18/local/la-me-cta-20120819 (last visited Feb. 20, 2015).

decision remains only as an anomalous relic. Principles of *stare decisis* do not require the Court to continue to adhere to a decision that has proven insufficient to protect constitutional rights.

The petition should be granted.

REASONS FOR GRANTING THE WRIT

I

THERE IS NO TIME LIKE THE PRESENT TO RIGHT CONSTITUTIONAL WRONGS

The most important part of freedom of expression is the right not to conform. It is relatively easy to create an enforced unity through political, legal, and social pressures, but the nonconformist must rely on the Constitution for protection. *See, e.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). To differ, or to refuse to support speakers or campaigns with which one disagrees, is often a lonely and courageous act, more in need of legal security than the right to join or to support an organization or movement. Dissent is by definition counter-majoritarian, which means that dissenters need the protection of institutions that shield them from majoritarian political processes. *See, e.g.*, Cass R. Sunstein, *Why Societies Need Dissent* 98 (2003) ("[A]t its core, [the First Amendment] is designed to protect political disagreement and dissent."). The judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). Workers who disagree with the political views of labor unions

are in precisely this situation, and this Court must therefore focus principally on protecting the right of workers to determine how their earnings—essential both to their private property as well as their expressive rights—will be spent.

Cases in which labor unions deduct money from workers' paychecks to spend on political activities implicate important issues of free speech, freedom of association, and freedom of choice. Labor unions often complain that restricting their access to such monies diminishes their effectiveness and imposes substantial hardships on them. *Cf. Knox*, 132 S. Ct. at 2290 ("[R]equiring objecting members to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions."). But this Court's focus should not be on the difficulties faced by unions when the law compels them to ask permission from workers before taking their money. Instead, the focus must be on the freedom of choice of individual workers. *Id.* at 2295 (the risk of pecuniary loss must lie with the "side whose constitutional rights are *not* at stake," i.e., the unions) (emphasis added). *Cf. Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007) ("For purposes of the First Amendment, it is entirely immaterial that [a law] restricts a union's use of funds only after those funds are already within the union's lawful possession . . . . What matters is . . . the union's extraordinary *state* entitlement to acquire and spend *other people's* money.") (emphasis added).

Given that the right at issue is the freedom of political expression, which this Court regards as a fundamental right subject to strict scrutiny, the Court

should be particularly keen to preserve individual freedom of choice in cases involving the compulsory support of labor union activities. "To preserve the protection of the Bill of Rights for hardpressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Glasser v. United States*, 315 U.S. 60, 70 (1942). Among other reasons for presuming against such a waiver are that the opposite presumption, or a scrutiny less than strict, could too easily blind courts to subtle coercion, or might allow workers, accidentally or through ignorance or duress, to waive vital constitutional liberties. In *Davenport*, this Court reinforced the central place of worker choice in cases involving compulsory union support. Giving a labor union "the power, in essence, to tax government employees," was "unusual," 551 U.S. at 184, and the First Amendment would allow a state to "eliminate . . . entirely" the "extraordinary benefit" of allowing the union to take money from the paychecks of workers to support union activities. *Id.* Thus the analysis in all union fees/expression cases must begin with and follow the expressive rights of individual workers.

The Court followed this individual rights approach in *Knox v. Service Employees International Union*, which held that the constitution requires a procedure by which workers can "opt-in" to paying for midyear assessments. 132 S. Ct. at 2293. The Court suggested in dicta that opt-in could be constitutionally required for *annual* agency shop fees as well and, further, that the Constitution might forbid a state from forcing its nonunion public employees to pay any union dues at all. *Knox*, 132 S. Ct. at 2289 (compelled membership in a public-sector union, which takes positions during collective bargaining that can have

powerful civic and political consequences, can "constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights" (citation and internal quotation marks omitted)).

In *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014), this Court recognized that earlier cases—*Abood* and those cases on which it relied—allowing agency shop fees for public employee unions stood on shaky foundations, because those cases improperly focused on the *union's* desires and convenience over the individual constitutional rights of dissenting employees. It reaffirmed that "[a]gency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees." *Id.* And "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Id.* at 2657.

Given the politically weak positions of dissenting workers, the unions' documented and pervasive abuses of the state-granted ability to garnish wages, the lack of protection in administrative agencies, and the fundamental importance of the expressive and associative rights at issue, protecting the individual's freedom to choose—and to dissent—in a unionized workplace must be the guiding principle in this case. *See* Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 Wayne L. Rev. 705, 717 (2003) (The "proper mooring" of "the union dues dispute" is "freedom of conscience."). *Abood* is flatly incompatible with individual rights, and this Court should grant the petition to reconsider and overrule it.

II

STARE DECISIS SHOULD NOT BAR RESOLUTION OF THE ISSUES IN THIS CASE

Two important constitutional issues are presented by this case. This first is whether the First Amendment prohibits compelled payment of dues to public-employee unions. *Abood* permits such compulsion, but last Term's decision in *Harris* provided the first real analysis of *Abood* that examined the cases on which it is based, and concluded that the "*Abood* Court seriously erred" in its application of earlier cases, and "fundamentally misunderstood" their holdings. *Harris*, 134 S. Ct. at 2632. Moreover, the *Abood* Court failed to "anticipate[] the magnitude of the practical administrative problems" in "attempting to classify public-sector union expenditures" as chargeable or not; or of the employees who "bear a heavy burden if they wish to challenge the union's actions." *Id.* at 2633. In short, the *Abood* decision after *Harris* appears to be a hollow shell, unworthy of this Court's deference.

The second question, regardless of whether *Abood* survives, is whether unions may garnish workers' paychecks absent the workers' affirmative consent (e.g., "opt-in"). Concurring in *Knox*, Justices Sotomayor and Ginsburg explained that the majority decision in that case raised this precise issue: "After today, must a union undertaking a special assessment or dues increase obtain affirmative consent to collect 'any funds' or solely to collect funds for nonchargeable expenses?" *Knox*, 132 S. Ct. at 2298-99 (Sotomayor, J., concurring). Having identified that this question

naturally flows from the *Knox* decision, the Court should answer it in this case.

In the realm of constitutional interpretation, considerations of *stare decisis* are at their weakest. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). It is appropriate to overrule previous decisions when intervening changes have "removed or weakened the conceptual underpinnings from the prior decision." *Id.* at 173. This has happened with regard to the presumption of conformity created by *Abood* and other cases: the unions' purposeful evasion of this Court's workers' rights decisions has proven that presumption to be unworkable.[3]

Second, a procedural principle ensconced in a court opinion cannot be immunized by *stare decisis* "once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965). For this reason, this Court is willing to reconsider judicial decisions that proved cumbersome in operation. *See, e.g., Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it." (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))). *Abood* works all too well for the unions desiring to

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[3] The Court already found the *Abood* procedures to be unworkable in the context of university student fees, *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 231-32 (2000); yet they are no less practical in their original context ("Even in the context of a labor union, whose functions are, or so we might have thought, well known and understood by the law and the courts ., we have encountered difficulties in deciding what is germane and what is not") (citing the fractured decisions in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991)).

spend "other people's money," but provides no constitutional protection for dissenting workers, a fact that the unions have abused in their increasingly aggressive attempts to bolster political warchests. *Cf. Knox*, 132 S. Ct. at 2291 (the "aggressive use of power by the SEIU to collect fees from nonmembers is indefensible.").

In addition, there has been no individual or social reliance on the presumption of conformity that would justify continuing to require workers to assert their objections rather than requiring unions to justify the taking of workers' earnings for political purposes. The dissent in *Harris* emphasizes that *unions and governments* have relied on *Abood* and does not want to disturb those reliance interests. *Harris*, 134 S. Ct. at 2645 (Kagan, J., dissenting) ("The *Abood* rule is deeply entrenched, and is the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the Nation."). The dissent's assessment of reliance interests ignores, however, the individual workers whose constitutional rights must be the primary focus. *See Knox*, 132 S. Ct. at 2290 ("[W]hat is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn't the default rule comport with the probable preferences of most nonmembers?"). Other workers are unaware of the rules governing agency shop fees and union dues, and have no settled expectations with regard to them. *See generally* Jeff Canfield, Comment, *What a Sham(e): The Broken* Beck *Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); R. Bradley Adams, *Union Dues and Politics: Workers Speak Out Against Unions Speaking For Them*, 10 U. Fla. J. of L. and Pub. Pol. 207, 222 (1998) ("[A]s a practical matter, if employees

are not aware that they need only "object" in order to trigger their First Amendment rights under a union or agency shop, these rights remain dormant. In fact, most union members are unaware of their right to prevent the union from spending their fees and dues on political causes.").

Considerations of *stare decisis* should not lead this Court to permit states to require union membership or its monetary equivalent; or to require workers to assert their objection to the taking of their earnings for the subsidizing of union political speech. When a precedent's "logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly—the costs of giving it *stare decisis* effect are unusually high." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 382 (2010). The unions should bear the burden of attracting adherents willing to subsidize union priorities and the unsupported holding of *Abood* should not stand in the way of this Court granting the petition and holding in favor of individual free speech rights.

CONCLUSION

After this Court's decision in *Harris*, which did not present a factual situation that would allow this Court to overrule *Abood*, the California Teachers Association created a slide show entitled "Not if, but when: Living in a world without Fair Share" (July 2014),[4] acknowledging that this Court is poised to uphold dissenting workers' First Amendment rights at

[4] Available at http://www.eiaonline.com/FairShare.pdf (last visited Feb. 20, 2015)

long last. *See also* Larry Sand, *Resigned to Freedom*, City Journal (Sept. 21, 2014) (anticipating the loss of state protection for dues collection from unwilling teachers, the CTA has developed "an action plan suggesting different techniques to attract new members.").[5] This Court should require public-employee unions to join the great American tradition of voluntary associations, where participants *willingly* contribute their time and treasure to common goals. In so doing, this Court would restore the primacy of individual rights under the First Amendment.

The petition for a writ of certiorari should be granted.

DATED: February, 2015.

Respectfully submitted,

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[5] Available at http://www.city-journal.org/2014/cjc0921ls.html (last visited Feb. 20, 2015).